

February 14, 2005

EX PARTE - VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Level 3 Petition for Forbearance, WC Docket 03-266

Dear Ms. Dortch:

Columbia Capital ("the Company") submits this letter in support of Level 3 Communications LLC's ("Level 3") Petition for Forbearance (the "Petition") filed with the Federal Communications Commission ("FCC" or "Commission") in the above referenced docket.¹ Columbia Capital is a venture capital firm specializing in the communications and information technology industries. The Company has managed investments in approximately 100 companies in the communications sector, ranging from small, early-stage investments to multibillion-dollar public companies. Since our founding in 1989, Columbia Capital has made private investments in the telecommunications and information technology industries of nearly \$1 billion.²

Columbia Capital understands that Level 3's Petition, if granted by the Commission, would prevent the imposition of access charges on certain Internet Protocol ("IP") traffic. Specifically, it would ensure that traffic between IP networks and the Public Switched Telephone Network ("IP-PSTN traffic") exchanged by telecommunications carriers³ would fall under the reciprocal compensation system, rather than the interstate and intrastate access charge systems.

¹ See *Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket 03-266 (filed Dec. 23, 2003) ("Level 3 Petition").

² More information on Columbia Capital is available on the Company's website: <http://www.colcap.com>.

³ Level 3's Petition does not apply, however, to IP-PSTN traffic exchanged with a rural incumbent local exchange carrier that qualifies for a Section 251(f) exemption under the Telecom Act. See Level 3 Petition at 8.

Columbia Capital views IP-enabled services, including Voice Over Internet Protocol (“VoIP”), as among the most promising new technologies. IP technology has been rapidly deployed over the past year, and we expect to see great benefits to the economy over the coming years from businesses and consumers using IP services.⁴ IP-enabled services also are becoming widely-used household products. Columbia Capital expects this development to fuel growth in the economy in general and in the communications industry specifically.⁵ We also believe that IP communications will give consumers enhanced control over the functionalities and features of the communications services they buy, and will make American businesses even more productive and competitive in the global marketplace.⁶ IP-enabled services can better achieve these benefits if allowed to develop free of the outmoded and outdated access charge regime, which virtually everyone in the communications industry agrees is in dire need of substantial reform.

The Commission’s *Vonage Order*,⁷ together with the decisions of federal courts,⁸ were important and positive first steps in addressing entry and rate regulation of IP communications.⁹

⁴ See Merrill Lynch, *Everything Over IP* (March 12, 2004) (citing growth in IP-telephony market, and noting that all major cable and telecommunications carriers have either begun IP deployment, or announced plans to do so in the future). Vonage Holdings Corp. also recently reported that it had reached a milestone with over 400,000 lines in operation. See Press Release, Vonage Holdings Corp., Vonage Crosses 400,000 Line Mark; Biggest Broadband Telephony Provider Netted More than 300,000 Lines in 2004 (Jan. 5, 2005).

⁵ See, e.g., Press Release, Infotechnics Research, Inc., Cable VoIP Subscribers Jump 900% 2003–2004; Double-Digit Growth in Equipment Spending Expected Through 2007 (Feb. 2, 2005) (“North American cable companies increased their investments in VoIP equipment to keep up with surging subscriber growth, nearly doubling their spending between 2003 and 2004, from \$63 million to \$123 million. Infonetics’ forecasts indicate strong growth will continue.”).

⁶ See, e.g., Press Release, Vonage Holdings Corp., Vonage Announces Official Launch Into the United Kingdom (Jan. 24, 2005) (citing the company’s entry into foreign markets). See also Press Release, Vonage Holdings Corp., Vonage Holdings Corp. Plans to Add 600 Jobs to New Jersey by Q1 2005 (Oct. 29, 2004).

⁷ See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order (rel. Nov. 12, 2004) (“*Vonage Order*”).

⁸ See, e.g., *Vonage Holdings Corp. v. Minnesota Public Utils. Comm’n*, 290 F. Supp. 2d 993 (D. Minn. 2003), *aff’d on other grounds*, No. 04-1434 (8th Cir. Dec. 22, 2004).

⁹ For example, Vonage received a considerable amount of private financing last year. See Press Release, Vonage Holdings Corp., Vonage® Completes \$105 Million Series D Financing Round Led By NEA, 3i And Meritech (Aug. 25, 2004); Press Release, Vonage Holdings Corp., New Enterprise Associates Invests An Additional \$40 Million In Vonage (Aug. 25, 2004).

But these decisions did not address another form of economic regulation—intercarrier compensation. Uncertainty as to which compensation mechanism (access charges or reciprocal compensation) applies to IP-enabled services reduces the incentive for firms like Columbia Capital to invest in the technology, as well as in the entire communications sector. Level 3 filed its Petition to help eliminate such uncertainty over the economic treatment of IP-enabled services. By creating certainty in how carriers compensate each other for the exchange of IP-PSTN traffic, capital markets will be much more likely to invest in companies that provide IP-enabled services. Granting the Petition would remove any remaining uncertainty concerning economic regulation and would allow providers of IP-enabled services to devote resources to developing and deploying IP-enabled services and products instead of engaging in protracted legal and regulatory disputes. The Petition would also provide the certainty necessary to ensure that any investments in IP-enabled technologies will not be wiped out by payments of access charges to incumbent local exchange carriers (“ILECs”) and the cost of the inevitable related litigation.

While Level 3’s Petition gives the Commission the opportunity to avoid addressing the question of whether access charges should apply retroactively, Columbia Capital urges the Commission to address directly the issue of retroactivity. Determining that access charges have not and do not apply to IP-PSTN communications under current rules will greatly increase the financial community’s confidence in IP-enabled services. By not addressing retroactivity in the *AT&T Order*,¹⁰ the FCC left considerable legal uncertainty as to whether access charges should apply to certain IP-telephony services provided prior to the release of that Order. As a result, numerous lawsuits have been filed against AT&T and other IP-enabled service providers in which ILECs are seeking retroactive access charges.¹¹ Similarly, ILECs have threatened to impose access charges on IP-enabled services which are not covered by the *AT&T Order*.¹² This pending litigation, in turn, creates financial uncertainty which has limited the availability of capital for IP-enabled service ventures.

It would be unfair and inconsistent with established law to require payment of access charges on a retrospective basis. Historically, the FCC has held that services involving a net protocol conversion, such as IP-PSTN communications, are information services exempt from

¹⁰ See *Petition for Declaratory Ruling that AT&T’s Phone-to Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (rel. Apr. 21, 2004).

¹¹ See, e.g., *Southwestern Bell Telephone L.P. et al. v. VarTec Telecom, Inc. et al.*, E.D. Mo., Case No. 4:04-cv-01303-CEJ (filed Sept. 24, 2004); *Qwest Communications v. AT&T Corp., et al.*, D. Colo., Case No. 1:04-cv-00909-EWN-MJW (filed May 5, 2004); *Southwestern Bell Telephone L.P. et al. v. AT&T Corp. et al.*, E.D. Mo., Case No. 4:04-cv-00474-HEA (filed April 22, 2004).

¹² See Letter from Notices Manager, Contract Management, SBC to Jennifer McMann, Director Regulatory Affairs, Level 3 Communications (dated Nov. 19, 2003), *Level 3 Petition*, Exhibit 2.

access charges.¹³ The Commission should therefore confirm that the services described in Level 3's Petition are enhanced/information services and, as such, the access charge exemption applies both prospectively and retroactively.

Finally, granting Level 3's Petition promotes good broadband public policy. Today there are millions of Americans without broadband Internet access, or with only one choice of broadband supplier (normally an ILEC or large cable company).¹⁴ When fully deployed, universally available, and competitively priced, broadband Internet access will provide American consumers with increased communications choices, boost the country's overall economic productivity, and improve communication services in other important areas of American life, such as education and health care. The Commission should actively promote technologies that will spur broadband deployment.

IP-enabled services are one such technology because customers of IP-enabled services must have broadband access to use these products.¹⁵ Thus, fostering the growth of IP-enabled services will drive nationwide broadband deployment and adoption.¹⁶ Columbia Capital believes

¹³ See generally *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, Reply Comments of Level 3 Communications LLC, WC Docket No. 03-266 (filed July 14, 2004). See also *id.* at 21-35 (explaining that net protocol conversion has historically been used to determine which services are intrinsically information services).

¹⁴ One estimate puts broadband penetration rates in the United States at approximately 6.89 broadband subscribers per 100 people. See *Birth of Broadband*, ITU Internet Reports Table A-12 (Sept. 2003) ("ITU Report"). The term "broadband" is defined in the ITU Report as "transmission capacity with sufficient bandwidth to permit combined provision of voice, data and video with no lower limit. Effectively, broadband is implemented mainly through ADSL, cable modem or Wireless LAN . . . services." See *id.* Glossary.

¹⁵ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, ¶ 5 (rel. Mar. 10, 2004) ("IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services. IP-enabled services, moreover, have increased economic productivity and growth, and bolstered network redundancy and resiliency.").

¹⁶ Merrill Lynch cites three reasons why IP services will drive broadband deployment:

- 1) for customers, the opportunity to save on phone costs via VoIP lowers the effective cost of having broadband service;
- 2) for cable operators in particular, bundled offerings are more lucrative than standalone services, providing a further incentive to promote and expand service offerings; and
- 3) for telcos, there is increasing pressure to sell DSL in order to defend voice revenues. A customer lost to cable [High Speed Data] Internet service increasingly represents a potential loss of the entire customer relationship.

that granting Level 3's Petition will be especially beneficial to the continued deployment of broadband facilities and the development of new technologies. A recent study performed by QSI Consulting confirms that ILECs are expected to receive increased incremental DSL revenues from demand caused in part by VoIP services.¹⁷ In contrast, denying the Level 3 Petition and imposing access charges on IP-enabled services could decrease the incremental demand for ILEC broadband services by \$39 million in 2005, \$56 million in 2006, \$76 million in 2007, and \$98 million in 2008.¹⁸ Moreover, if IP-enabled traffic is exchanged at interstate access rates rather than reciprocal compensation rates, QSI assumes that demand for VoIP lines could be 20% lower, and calling volumes on VoIP lines could be 5% lower.¹⁹ Thus imposing access charges on IP-enabled services would slow deployment of these exciting new technologies. In sum, freeing IP-enabled services from legacy economic regulations will in turn spur additional demand for broadband services and further economic growth.

For the foregoing reasons, Columbia Capital supports Level 3's Petition. We hope that the Commission will take quick action on this matter and eliminate uncertainty surrounding intercarrier compensation for IP-enabled services.

Sincerely,



Andrew D. Lipman
Tamar E. Finn

Counsel for Columbia Capital

cc: Chairman, Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein

Merrill Lynch, *Everything Over IP* at 15 (March 12, 2004).

¹⁷ See Level 3 Ex Parte, WC Docket Nos. 03-226, 04-36 (Jan. 27, 2005), QSI Technical Documentation, *IP-Enabled Voice Services, Impact of Applying Switched Access Charges to IP-PSTN Voice Services*, 6-7 ("*QSI Study*").

¹⁸ See *id.* at 5 and Attachment 1 at 14.

¹⁹ *Id.* at 33.